

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. <u>97-234</u>
of the Communications Act--)	
Competitive Bidding for Commercial)	
Broadcast and Instructional)	
Television Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the)	GEN Docket No. 90-264
Commission's Comparative Hearing)	
Process to Expedite the)	
Resolution of Cases)	

To: The Commission

REPLY COMMENTS OF
SUSAN M. BECHTEL

I.

Anchor Broadcasting Limited Partnership

1. This Section I replies to the letter dated January 28, 1998 signed by Dr. Francis L. Smith and Dr. Ridgely C. Bennett as limited partners of Anchor Broadcasting Limited Partnership ("Anchor"), applicant for construction permit for a new FM station at Selbyville, Delaware. One of the other applicants in that proceeding was Susan M. Bechtel.

2. Anchor was awarded the construction permit in a comparative proceeding based on "integration" of ownership and management that was struck down as unlawful by the Court of Appeals in the Selbyville case, i.e., Bechtel v. FCC (I), 957 F.2d 873 (D.C.Cir. 1992) and Bechtel v. FCC (II), 10 F.3d 875 (D.C.Cir. 1993). Anchor complains that the law was changed to its detriment and asks the Commission to restore the law back in

its favor.

3. Parties to litigation are bound by that litigation in the normal course. Laidlaw Corporation v. NLRB, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). The court held that trial of the Selbyville proceeding was unlawful because of employment of the Commission's arbitrary and capricious "integration" comparative criterion. The award of the construction permit to Anchor was unlawful. Mrs. Bechtel is entitled to consideration of her application free of contamination by that unlawful process. Otherwise, the decision rendering the process unlawful will be mere dicta in the very case in which that decision was made. Stovall v. Denno, 388 U.S. 293, 301 (1967).

4. While to be sure Anchor sustained a loss as a party litigant, it is entitled to no consideration because Anchor chose to build the radio station. To the contrary, Anchor has had the benefit of operating a radio station, by its own account for the past five years, to which it has never had good title. Moreover, from the time Anchor was awarded the construction permit, it was aware of the legal attack on that award by Mrs. Bechtel. Not only that, when Anchor elected to construct and place the station on the air, in or about March 1993, it had been on notice for more than a year that in January 1992 the Court of Appeals in Bechtel (I) had reversed the award of the construction permit to Anchor and remanded the case to the Commission to consider the arguments of Mrs. Bechtel attacking the "integration" criterion.

5. Anchor built the station and commenced operation on its own initiative and for reasons known only to it. The most likely reason is that Anchor did so in anticipation of enjoying the fruits of the radio operation while the litigation continued to run its course. Anchor could not rationally have done so to advance its cause on the merits of the litigation, for the Commission does not consider evidence of station operations while the operator's credentials are pendent lite before the agency.

6. The case law on Anchor's voluntary choice of proceeding with construction is clear. Parties who proceed to act on an FCC decision that has been appealed in the courts do so at their peril, and must be prepared to unwind that action if the court appeal goes against them. E.g., Teleprompter Corp., 50 RR2d 125, 127 (Cable Bureau 1981); Improvement Leasing Co., 73 FCC2d 676, 684 (1979), aff'd, Washington Ass'n for Television and Children v. FCC, 665 F.2d 1264 (D.C.Cir. 1981).

II.

Minority and female preferences

7. In the rulemaking notice, at ¶¶88-91, the Commission stated that under Aderand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), United States v. Virginia Military Institute, 116 S.Ct. 2264 (1996) and Lamprecht v. FCC, 958 F.2d 382 (D.C.Cir. 1992), there are constitutional obstacles to adopting auction or comparative preferences for minorities and women, and asked that parties who wanted to support such preferences provide specific, imaginative arguments for dealing with the constitutional obstacles.

8. While Anchor, referred to in Part I above, asks for the minority preference, it has not provided any such supporting arguments. Anchor is not alone in that. Neither have other commenting parties...with respect to minority or female preferences.

9. In Comments filed January 26, 1998, Sinclair Broadcast Group, Inc. states that favored treatment of minorities in auctions will not pass muster under Aderand and suggests that minorities might receive favored treatment in other ways, such as under multiple ownership rules, without explaining why this would fare any better under Aderand.

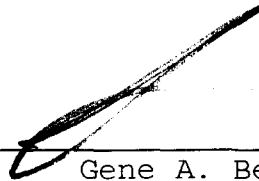
10. In Comments filed January 26, 1998, James G. Cavallo, at 9-10, says favored treatment of minorities promotes program diversity and therefore "plainly meets" the Aderand holding, without any analysis except to cite a 1919 decision prior to the advent of broadcasting itself.

11. In Comments filed January 26, 1998, American Women in Radio and Television provides a thoughtful essay on the subject of sex discrimination and the Aderand, Lamprecht and VMI decisions, but, at 6, 10, 16-17, falls back on its recurring plea for government-sponsored studies to develop the data which AWRT believes will support its position.

12. Based on our review of what we believe to be the comments of all parties, no one has come up with a convincing argument. It is fair to say that the law of the land is that minority and female preferences in auctions and comparative

proceedings are unconstitutional, and the Commission's rules and policies should be neutral on that score.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Gene A. Bechtel", is written over a horizontal line.

Gene A. Bechtel

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February 17, 1998

Courtesy copies of these Reply Comments are being mailed to Drs. Smith and Bennett at the address shown on their letter, to their colleague, Dr. Stamps, who also received a copy of the opening Comments of Mrs. Bechtel, and to counsel for Sinclair, Mr. Cavallo and AWRT.